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IN THE

Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF AMICUS CURIAE NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE* [1]

The New York Council of Defense Lawyers ("NYCDL"), established in 1986, is a not-for-profit professional association whose membership consists of approximately 200 lawyers, many of them former federal prosecutors, who devote a substantial part of their practices to the defense of those investigated or prosecuted for criminal offenses. The NYCDL's principal mission is to engage the Bench and Bar, including government attorneys, in a continuing collegial dialogue — through symposia, retreats, lectures, testimony, *amicus* briefs, and special events — concerning the legal, ethical and practical issues confronting attorneys and judges in the criminal justice system, particularly in the federal courts of New York.

Because of the wide experience and expertise of its members, the NYCDL has been invited to appear as *amicus curiae* in federal and state appellate courts. *See, e.g., United States v. Thomas*, 248 F.3d 76 (2d Cir. 2001) (*en banc*). Representatives of the NYCDL have also testified before Congress and the United States Sentencing Commission.

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1. Each party's blanket consent to *amicus* submissions has been filed with the Clerk of the Court. No counsel for a party wrote this brief in whole or in part, and no person or entity, other than the NYCDL or its members or counsel, has made a monetary contribution to the preparation or submission of this brief.

This Court has repeatedly recognized that Congress modeled the Hobbs Act, 18 U.S.C. §1951, after New York's extortion statute, and was informed by New York case law interpreting that statute. As a professional association consisting of New York attorneys with vast experience — as prosecutors and defense counsel — with both New York law and the Hobbs Act, the NYCDL is uniquely situated to comment on the important Hobbs Act issues raised by this case.

STATEMENT OF THE CASE

Amicus adopts the statement of the case reflected in the brief of petitioners Scheidler, Scholberg, Murphy and Pro-Life Action League, Inc.

SUMMARY OF ARGUMENT

In affirming petitioners' civil RICO liability for treble damages based on federal Hobbs Act predicates, the court of appeals misperceived the language, history and meaning of the Act (18 U.S.C. §1951), particularly the critical term "obtaining of property from another" in the Act's definition of "extortion." 18 U.S.C. §1951(b)(2). The lower court's misunderstanding is exemplified by the perfunctory manner in which it addressed and decided the far-reaching issue whether depriving patients of, or causing them to abandon, their right of access to abortion services constitutes "obtaining property" within the

meaning of the Act. *National Organization for Women, Inc. v. Scheidler*, 267 F.3d 687, 707, 709 (7th Cir. 2001). The same perfunctory and unsatisfying approach has infected lower court decisions in other Hobbs Act cases in the abortion protest context. *See United States v. Arena*, 180 F.3d 380, 394 (2d Cir. 1999) (abortion protesters' Hobbs Act conviction upheld on the ground that, according to a dictionary entry, "obtain" is synonymous with "attain disposal of," so that extortion can be committed without anyone "obtaining" anything from victim).

Intimidating or violence-prone anti-abortion protests are not the only context in which the lower federal courts have adopted strained, perfunctory and ultimately insupportable interpretations of the plain language of the federal extortion statute. The same disturbing tendency is discernible in the emotion-laden context of Hobbs Act labor cases. *See, e.g., United States v. Bellomo*, 176 F.3d 580, 593 (2d Cir. 1999) (court concludes without analysis that "[t]he right of the members of a union to democratic participation in a union election is property [for purposes of the Hobbs Act]").

The plain language of the statute, as well as its legislative history and the common law meaning of extortion that the Hobbs Act was intended to embody, all weigh against the overly elastic interpretation of the Act reflected in the foregoing cases, whether in the anti-abortion or labor context. Only a handful of lower federal courts, however, have addressed these issues. As a result,

this case presents the Court with a perfect opportunity to arrest this aberrant tendency, whatever the context in which it is found, without unsettling Hobbs Act jurisprudence.

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected a similarly strained interpretation of the mail fraud statute, despite a far more developed and consistent pre-existing body of mail fraud jurisprudence. There is as much, or more, reason for the Court to adopt the same approach here, because the Hobbs Act subjects an offender to as much as 20 years' imprisonment (mail fraud penalties are far less severe); the Hobbs Act is narrower than the mail fraud statute; and Congress is capable of making clear, as it did in the mail fraud context by enacting 18 U.S.C. §1346, that it intends the term "obtaining of property" to have a broader meaning than the plain language, legislative history and common law understanding of the Hobbs Act currently would support. The judgment of the court of appeals should be reversed.

ARGUMENT

CONSISTENT WITH THE PLAIN LANGUAGE AND LEGISLATIVE HISTORY OF THE FEDERAL EXTORTION STATUTE, "OBTAINING OF PROPERTY FROM ANOTHER" MUST REFER TO AN ASSET, COMMODITY OR RIGHT WITH ECONOMIC VALUE CAPABLE OF BEING ASSIGNED, SOLD OR OTHERWISE TRANSFERRED, AND CANNOT INCLUDE MERE INTERFERENCE WITH CONSTITUTIONAL OR STATUTORY RIGHTS SUCH AS THE RIGHTS OF WOMEN TO OBTAIN ABORTION SERVICES OR THE DEMOCRATIC RIGHTS OF UNION MEMBERS

This case presents important issues concerning the meaning of the Hobbs Act left open in *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 253 n.2 (1994) (*"Scheidler I"*). It also presents the Court with an opportunity to correct two errant lines of authority from the lower federal courts, both characterized by a strained and ultimately insupportable interpretation of the "obtaining property" element of the Hobbs Act.[2] The first

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2. The Hobbs Act punishes by imprisonment for as much as 20 years anyone who obstructs or affects interstate commerce by robbery or extortion or attempts or

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line of authority arises in the emotionally charged context of anti-abortion protests, typified by the case now before the Court. The second line of authority arises in the equally freighted context of extortion prosecutions involving labor unions.[3] Both lines of authority are of

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2. (...continued)
conspires to do so. 18 U.S.C. §1951(a). For purposes of the Act, "extortion" means "*the obtaining of property from another*, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right." 18 U.S.C. §1951(b)(2) (emphasis added).

3. These cases hold generally that the core element of the extortion statute — "obtaining of property from another" — is satisfied by depriving union members of, or causing them to abandon, their right to democratic participation in union affairs, or depriving them of their right to loyal and responsible representation by union officials, rights guaranteed by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. §§411 and 501(a). *See United States v. Bellomo*, 176 F.3d 580, 593 (2d Cir. 1999); *United States v. Debs*, 949 F.2d 199, 201-02 (6th Cir. 1991); *United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267, 281-82 (3d Cir. 1986); *United States v. District Council of New York City and Vicinity of the United Brotherhood of Carpenters and Joiners of America*, 778 F. Supp. 738, 755 (S.D.N.Y. 1991); *United States v. International Brotherhood of Teamsters*, 708 F. Supp.
(continued...)

relatively recent vintage, and each has generated only a handful of reported decisions. Thus, adopting the position of the NYCDL, and nipping this aberrant strain in the bud, will not unsettle well-established Hobbs Act jurisprudence. On the contrary, it will preserve the Hobbs Act against constitutional challenges on vagueness grounds.

If there is to be such a radical departure from the plain language and legislative history of the Hobbs Act, it should of course be Congress, and not the federal courts, which takes that step. If the Court adopts petitioners' and the NYCDL's interpretation of the Hobbs Act, Congress can easily amend the statute, if it so desires, to punish those who deprive others of rights, or cause others to abandon rights, even if the rights are not understood as "property," and even if the offender has not "obtain[ed]" those rights for himself or a third person. Congress did virtually the same thing when it enacted 18 U.S.C. §1346 to overrule legislatively the Court's decision in *McNally*, which had put an end to a long line of cases from the courts of appeals upholding the "honest services" theory of mail fraud.

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3. (...continued)
1388, 1397-99 (S.D.N.Y. 1989).

A. The Meaning of "Property" under the Hobbs Act

1. The Plain Language of the Statute

The plain language of the Hobbs Act limits the meaning of the term "property" to the kind of property that can be "obtain[ed]." This language should foreclose any exotic interpretation of the term "property" that includes a woman's right of access to an abortion clinic or the right of labor union members to union democracy and to loyal and responsible representation by union officials, because none of these rights is commonly understood as either "property" or "obtain[able]" from another. On the contrary, the obvious and most natural interpretation of "property" that can be "obtained" within the meaning of the Hobbs Act is property in its common law sense, i.e., a thing capable of being assigned, conveyed or transferred. *See People v. Learman*, 261 App. Div. 748, 753, 28 N.Y.S.2d 360, 365 (4th Dep't 1941) ("The fact that an operator's license is not transferable or assignable shows that it is not property" for any purpose under New York's extortion statute).[4]

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4. Because the Hobbs Act was modeled on New York's extortion statute (*Evans v. United States*, 504 U.S. 255, 264 (1992); *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973)), New York extortion cases are highly relevant in construing the Hobbs Act. *United States v. Nedley*, 255 F.2d 350, 355 (3d Cir. 1958) (when

(continued...)

The significance of the Hobbs Act's plain language — "the obtaining of property from another" — is reinforced by contrasting the Hobbs Act with the mail fraud statute which, by its terms, does not require an actual or contemplated deprivation of "property." *See* 18 U.S.C. §1341 ("Whoever, having devised or intending to devise any scheme or artifice to defraud . . ."). The omission of the term "property" from the quoted portion of the mail fraud statute encouraged the lower federal courts to interpret the statute broadly to include schemes intended to deprive another of intangible non-property rights, like the right to an agent's honest services. That interpretation was ultimately rejected by this Court in *McNally*, which limited the mail fraud statute to schemes designed to deprive the victim of property. The fact that the Hobbs Act, unlike the relevant portion of the mail fraud statute, contains the term "property," and requires "the obtaining of property from another" to commit the offense, refutes any notion that the Hobbs Act is broader than the mail fraud statute, and undermines any claim that the extortion statute reaches the kind of intangible, non-transferrable interests the mail fraud statute was once incorrectly thought to protect.

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4. (...continued)
interpreting the Hobbs Act, federal courts are "required to look to the New York Penal Laws relating to robbery [and extortion] and the construction given them by the New York courts").

The scope of the Hobbs Act is comparable to that of the second clause of the mail fraud statute, which prohibits schemes "for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. §1341. Indeed, the Solicitor General has recently argued in another case that because Section 1341 does not contain the key phrase "from another" after the words "obtaining money or property," the mail fraud statute covers schemes by which the offender "obtains something that might not be 'money or property' in the hands of the victim, but that becomes 'money or property' in the defendant's own hands." Brief for the United States at 12, *Cleveland v. United States*, 531 U.S. 12 (2000) (No. 99-804). Thus, the Hobbs Act, which *does* require that property be obtained "from another," is, if anything, even more restrictive than the "obtaining property" clause of the mail fraud statute.

In other words, by its terms, the Hobbs Act protects property and property rights, and not intangible, non-transferrable rights like a woman's right of access to abortion services or the LMRDA rights of union members. As this Court has recently and repeatedly warned in rejecting expansive interpretations of the mail fraud statute, "'if Congress desires to go further, it must speak more clearly than it has.'" *Cleveland v. United States*, 531 U.S. 12, 20 (2000) (quoting *McNally*, 483 U.S. at 360).

Where, as here, "the statutory language is unambiguous" and the legislative history presents no "'clearly expressed legislative intent to the contrary,' that

would warrant a different construction" (*Scheidler I*, 510 U.S. at 261 (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 177 (1993))), the language of the statute should control. Thus, just as this Court relied on the plain language of the RICO statute in rejecting these petitioners' argument in *Scheidler I* that RICO should be limited to economically motivated conduct, this Court should find that the plain language of the Hobbs Act precludes the interpretation of "obtaining of property from another" urged here by the respondents.

2. Legislative History and New York Law

The legislative history of the Hobbs Act strongly supports the conclusion that the Act does not reach interference with the intangible rights of women to gain access to abortion services or the intangible democratic rights of union members conferred by the LMRDA. In view of petitioners' extensive analysis of the legislative history of the Hobbs Act and the relevance and meaning of New York extortion jurisprudence, no point would be served in duplicating that effort here.

One point, however, deserves emphasis. The congressional debates on the Hobbs Act demonstrate that Congress was cognizant of, and concerned about, the possibility that the Hobbs Act would federalize conduct

that had always been prosecuted locally.[5] In *United States v. Enmons*, 410 U.S. 396 (1973), this Court expressed the same federalism concerns about the Hobbs Act:

> "Congress has traditionally been reluctant to define as a federal crime conduct readily denounced as criminal by the States. . . . [W]e will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction."

Id. at 411-12 (quoting *United States v. Bass*, 404 U.S. 336, 349 (1971)).

Congress's concern with the federalism implications of the Hobbs Act is significant. Similar concerns prompted this Court in *McNally* to limit the reach of the

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5. *See, e.g.*, 91 Cong. Rec. at 11,848 (Dec. 11, 1945) (remarks of Rep. Powell) ("Extortion and robbery are crimes in all 48 states. Ample state laws and police are provided"); *id.* at 11,913 (Dec. 12, 1945) (remarks of Rep. Resa) ("[O]ffenses against persons and property which the pending bill would make punishable are already punishable under existing law of the several states. They can be prosecuted more effectively under the laws of the states than they could be under this bill if it became a law. . . . This is another instance of objectionable duplication of the Federal Government of the functions and activities of the states").

mail fraud statute and to reject "honest services" mail fraud as a viable theory:

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.

483 U.S. at 360.[6]

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6. The federalism concerns triggered by the Hobbs Act, which have been articulated by this Court as well as Members of the Congress that enacted the statute, contradict the reasoning of several lower federal courts that have found that *McNally* did not provide a basis for limiting the meaning of "property" under the Hobbs Act. *See United States v. Debs*, 949 F.2d at 201-02 (*McNally* was "clearly concerned with federalism" and the federalism rationale "has no analogue in the union arena"); *United States v. International Brotherhood of Teamsters*, 708 F. Supp. 1388, 1399 (S.D.N.Y. 1989) (characterizing LMRDA rights as property "does not involve the federal government in setting arbitrary standards for conduct in a way that the same characterization of the ethereal and changeable notions of 'good government' or 'honest and

(continued...)

3. The Federal Hobbs Act Cases

The Second Circuit has held that the concept of "property" under the Hobbs Act, while not limited to physical or tangible property, must be at least a "valuable right considered as a source or element of wealth." *Town of West Hartford v. Operation Rescue*, 915 F.2d 92, 101 (2d Cir. 1990) (quoting *United States v. Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969)). Although it represents an unwarranted expansion of New York law as it existed when the Hobbs Act was enacted, the *Tropiano* formulation still does not support the lower court's interpretation of the Hobbs Act in this case. Even if the overly broad *Tropiano* standard were adopted, intangible rights such as a woman's right to gain access to abortion services or the democratic rights of union members could not be considered property, since "a source or element of wealth" is reasonably understood to mean an asset, commodity or right with economic value and capable of being transferred, assigned or sold.

In *Tropiano* itself the court deemed "the right to solicit business" to be "property" (418 F.2d at 1075-76), a

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6. (...continued)
faithful services' would"). Stretching the concept of "property" in the Hobbs Act to reach interference with abortion rights or union democracy would reduce the term "property" itself to an "ethereal and changeable notion," thus involving the federal government in "setting arbitrary standards for conduct."

conclusion that was at least defensible, since "the right to solicit business" could be considered the equivalent of a non-compete clause which is often economically valued and compensated in commercial transactions. By contrast, in *Town of West Hartford*, the Second Circuit recognized that characterizing as property under the Hobbs Act "altered official conduct," i.e., "a softened response" by town law enforcement officials to the illegal conduct of abortion protesters, was "so blatantly implausible that its rejection requires no aid from the rule of lenity." 915 F.2d at 102.

Like the "altered conduct" in *Town of West Hartford*, a woman's right of access to abortion services or the democratic rights of labor union members cannot be considered "a source or element of wealth" in themselves. Such rights therefore cannot be "property" within the meaning of the Hobbs Act, any more than marrying a wealthy woman is "a source or element of wealth" for purposes of the Hobbs Act. Certainly no one would suggest that interference with or the prevention of such a marriage by the family of the woman could constitute obtaining property from a fortune-seeking spouse within the meaning of the Act. Interference with abortion rights or union members' LMRDA rights is, if anything, an even more attenuated or indirect "source or element of wealth."

True, the right of access to abortion services or the democratic rights of union members may somehow have economic consequences that could arguably be viewed as "a source or element of wealth." Almost everything can or

does. *Tropiano's* formulation of the meaning of "property" in the Hobbs Act cannot simply mean having indirect economic consequences. At the very least, the test must be whether a right or thing can itself be economically valued. That was the historic meaning of property under New York's extortion statute, and that was the kind of property that the legislative history shows Congress had in mind when it passed the Hobbs Act.

Viewed in this light, the handful of federal cases holding or suggesting that the LMRDA rights of union members are Hobbs Act "property" should be seen as aberrant. Certainly those cases are devoid of any real analysis. For example, the Sixth and Third Circuits inexplicably relied on *Dusing v. Nuzzio*, 177 Misc. 35, 29 N.Y.S.2d 882 (Sup. Ct. Ulster Co.), *aff'd as modified*, 263 App. Div. 59, 31 N.Y.S.2d 849 (3d Dep't 1941), as support for the proposition that "rights incident to union membership are protectible property interests" under New York law, and are therefore "property" for purposes of the Hobbs Act. *United States v. Debs*, 949 F.2d 199, 201 n.2 (6th Cir. 1991); *United States v. Local 560, International Brotherhood of Teamsters*, 780 F.2d 267, 281-82 (3d Cir. 1986). *Dusing*, however, was not an extortion case, but an injunctive proceeding on equitable grounds seeking to force a union to hold elections and to give an accounting. It has no relevance to interpreting the Hobbs Act or New York's extortion statute. In fact, *Dusing* has never been cited by any New York court, state or federal, in the context of an extortion prosecution, let alone as authority

for a broad interpretation of the term "property" under the Hobbs Act.

The Second Circuit fares no better. In *United States v. Bellomo*, 176 F.3d 580 (2d Cir. 1999), the court stated in conclusory fashion that "[t]he right of the members of a union to democratic participation in a union election is property; that the right is intangible does not divest it of protection under the Hobbs Act." *Id.* at 593. The only authority *Bellomo* cited for that far-reaching proposition was the Third Circuit's decision in *Local 560*, which depended heavily on *Dusing*. Moreover, neither side had briefed the "property" issue in *Bellomo*. Thus, the validity of the Second Circuit's holding in *Bellomo* — or even whether it is a holding — is questionable.

In short, however "valuable" abortion rights may be to women, and LMRDA rights to union members, they are at best an indirect, attenuated and uncertain "source or element" of pecuniary wealth. Those rights have no independent economic value any more than does the First Amendment right of a business to petition government for favorable economic legislation. *See G-I Holdings, Inc. v. Baron & Budd*, 179 F. Supp. 2d 233, 256 (S.D.N.Y. 2001) (Hobbs Act claim fails because victim's "First Amendment right to petition government does not constitute property that can be extorted").[7]

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7. The court in *G-I Holdings* believed that democratic participation in union affairs was "more clearly

(continued...)

B. The Meaning of "Obtaining" under the Hobbs Act

Petitioners' brief comprehensively addresses the meaning of "obtaining" in the Hobbs Act, and no point would be served by duplicating that effort here. Suffice it to say that while it may be possible, through "force, violence, or fear, or under color of official right" (18 U.S.C. §1951(b)(2)), to deprive another of intangible rights, or to prevent another from enjoying such rights, it is simply not possible for a purported extortionist (or a third party) to "obtain" the rights from the victim, as required under the Hobbs Act.

The distinction between obtaining property and altering conduct (*see Town of West Hartford*, 915 F.2d at 102) has been recognized by at least one federal court as the distinction between extortion and coercion. While

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7. (...continued)
economic in nature" than petitioning government for "economically favorable legislation . . . by an interested business entity," i.e., seeking protective legislation from ruinous asbestos-related lawsuits. 179 F. Supp. 2d at 256-57. The court was mistaken. It is hard to imagine a right more clearly "economic in nature" than the right of asbestos companies to petition Congress for legislation protecting them from civil damage actions. Even if union democracy is "more clearly economic in nature," LMRDA rights are not nearly "economic" enough to constitute "property" under the Hobbs Act.

extortion requires "the obtaining of property from another," "[c]oercion is the compelling of a person (by instilling fear in him) to do an act (or not to do an act) which that person has a legal right not to do (or to do)." *United States v. Private Sanitation Industry Ass'n*, 793 F. Supp. 1114, 1131 (E.D.N.Y. 1992). Coercion is precisely the conduct engaged in by petitioners, who attempted to prevent clinics and doctors from providing, and patients from receiving, abortion services, or by someone who would attempt to compel union members not to participate in their union's affairs by exercising their democratic union rights. Coercion, i.e., using force or fear to interfere with the exercise of a person's legal rights, is not extortion, i.e., using force or fear to *obtain* a person's property; nor is coercion a RICO predicate. *Private Sanitation*, 793 F. Supp. at 1131-32.

If Congress had wanted the Hobbs Act to reach interference with interstate commerce through coercion as well as robbery and extortion, it could easily have added coercion to the statute. Indeed, Congress can still do so by amending the statute, just as Congress amended the mail fraud statute after *McNally* by adding 18 U.S.C. §1346. The federal courts, however, are not free to do so.

Perhaps the best example of the lengths to which the federal courts have been compelled to go to fit the square peg of interference with personal rights into the round hole of "obtaining of property" under the Hobbs Act is *United States v. Arena*, 180 F.3d 380 (2d Cir. 1999), where the Hobbs Act convictions of abortion activists

were upheld because of the court's conclusion, based only on creative use of the dictionary, that "obtaining" property from another is synonymous with causing another to "abandon" property:

> A perpetrator plainly may "obtain[]" property without receiving anything, for obtaining includes "attain[ing] . . . disposal of," *Webster's Third New International Dictionary* 1559 (1976); and "disposal" includes "the regulation of the fate . . . of something," *id.* at 655. Thus, even when an extortionist has not taken possession of the property that the victim has relinquished, she has nonetheless "obtain[ed]" that property if she has used violence to force her victim to *abandon* it.

180 F.3d at 394 (emphasis added). Where a lengthy prison sentence is the likely consequence of a conviction under the Hobbs Act, the process of appellate adjudication that occurred in *Arena* — essentially reading out of the statute the element of "obtaining," with all its common law history, and replacing it with a dictionary definition with a totally different meaning — presents a cautionary tale. Such expansive interpretations of federal criminal statutes should be discouraged.

C. The Doctrine of Constitutional Doubt

Because of the severe consequences of violating the Hobbs Act, the doctrine of constitutional doubt should be applied to this case and to the interpretation of the Act generally. Under that doctrine, "'where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [a court's] duty is to adopt the latter.'" *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909)).

Interpreting the term "obtaining of property" to include interference with or causing the abandonment of abortion rights or LMRDA rights of union members would likely render the Hobbs Act void for vagueness.[8] To avoid

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8. If the term "obtaining of property" in the federal extortion statute is interpreted to include interference with a woman's right of access to abortion services or labor union members' LMRDA rights, that provision would be unconstitutionally vague as applied because it would "forbid[] . . . the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). The statute would suffer from the twin evils that the vagueness doctrine is intended to avoid: it would deprive citizens of "a reasonable opportunity to know what is prohibited, so

(continued...)

that constitutional problem, the scope of the statute should be construed as being limited to the "obtaining of property," as those terms are ordinarily understood "in [other] legislation" and "in conversation." *Jones*, 529 U.S. at 855. Thus, a narrow interpretation of the term "obtaining of property" is appropriate in this case, not only because it accords with logic, the legislative history and underlying purpose of the Hobbs Act, and "the common perception" (*id.* at 856), but also because "a close construction will often save an act from vagueness that is fatal." *Williams v. United States*, 341 U.S. 97, 101 (1951); *see also Hamling v. United States*, 418 U.S. 87, 113-14 (1974); *United States v. 12 200-ft. Reels of Super 8mm. Film*, 413 U.S. 123, 130 n.7 (1973); *United States v.*

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8. (...continued)
that [they] may act accordingly," and it would "impermissibly delegate[] basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). The fact that this is a civil RICO case would not bar a constitutional vagueness challenge since a statute that "has criminal applications . . . must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 257 (1989) (Scalia, J., concurring) (citing *FCC v. American Broadcasting Co.*, 347 U.S. 284, 296 (1954)).

Harriss, 347 U.S. 612, 617-24 (1954); *Screws v. United States*, 325 U.S. 91, 98 (1945).[9]

* * *

Whatever their motivation, intimidation or coercion by abortion protesters or by those who would corrupt labor unions should not be punished under the Hobbs Act by doing violence to the language and history of the statute. Regardless of the identity or motives of the actor, conduct that is only coercive, like that of the abortion protesters in this case, does not make out "obtaining of property" within the meaning of the Hobbs Act.

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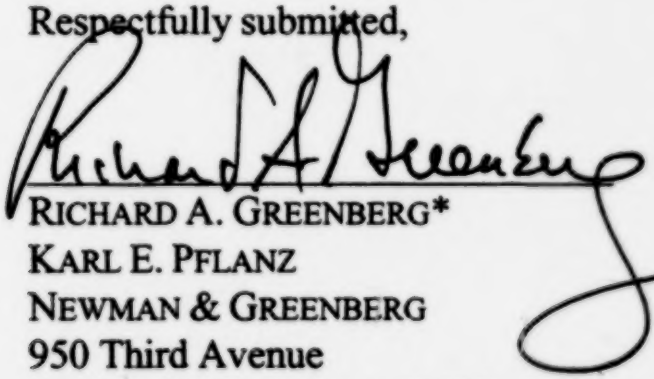
9. Although this is not a criminal case, the rule of lenity applies, since this civil RICO case is predicated upon a criminal statute. *Town of West Hartford*, 915 F.2d at 102 (collecting cases). The rule of lenity requires adoption of the narrower construction of the Hobbs Act that the NYCDL and petitioners urge upon the Court.

CONCLUSION

For the reasons set forth above, and for those set forth in the brief for petitioners Scheidler, et al., the judgment of the court of appeals should be reversed.

Dated: New York, New York
July 12, 2002

Respectfully submitted,



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